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IN THE

Supreme Court of the United States

JON B. CUTTER, ET AL.,

Petitioners,

v.

REGINALD WILKINSON, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE AMERICAN CORRECTIONAL CHAPLAINS ASSOCIATION, FORMER STATE CORRECTIONS OFFICIALS, STATE PRISONERS, PRISON FELLOWSHIP, JEWISH PRISONER SERVICES INTERNATIONAL, ALEPH, THE AMERICAN CATHOLIC CORRECTIONAL CHAPLAINS ASSOCIATION, ADVENTIST CHAPLAINCY MINISTRIES, CITIZENS UNITED FOR THE REHABILITATION OF ERRANTS, THE JOHN HOWARD ASSOCIATION, SHAMBALA PRISON COMMUNITY, THE PRISON DHARMA NETWORK, AND ROBERT C. LYNN AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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Lee Boothby & Nicholas P. Miller, *Prisoner Claims for Religious Freedom and State RFRAs*, 32 U.C. Davis L. Rev. 573 (1999)..... 25

Todd R. Clear et al., *The Value of Religion in Prison: An Inmate Perspective*, 16 J. Contemp. Crim. Just. 53 (2000) 18

Todd R. Clear & Melvina T. Sumter, *Prisoners, Prison, and Religion: Religion and Adjustment to Prison*, 35 J. Offender Rehab. 127 (2002)..... 12, 13

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Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions*, 28 Harv. J.L. & Pub. Pol'y (forthcoming 2005) 25

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Bryon R. Johnson et al., *Religious Programs, Institutional Adjustment, and Recidivism Among Former Inmates in Prison Fellowship Programs*, 14 Just. Q. 145 (1997).....12, 13, 14

Bryon R. Johnson, *Religious Programs and Recidivism Among Former Inmates in Prison Fellowship Programs: A Long-Term Follow-Up Study*, 21 Just. Q. 329 (2004)..... 13

Thomas P. O'Connor & Michael Perreyclear, *Prison Religion in Action and Its Influence on Offender Rehabilitation*, 35 J. Offender Rehab. 11 (2002)..... 12, 13, 15, 16

Margo Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. 1555 (2003) 25

Melvina T. Sumter, *Religiousness and Post-Release Community Adjustment, Graduate Research Fellowship—Executive Summary* (Sept. 25, 2000), *available at* http://www.ncjrs.org/pdffiles/nij/grants/184509.pdf..... 14

Jody L. Sundt & Francis T. Cullen, *The Correctional Ideology of Prison Chaplains: A National Survey*, 30 J. Crim. Just. 369 (2002)..... 16

Mark C. Young et al., *Long-Term Recidivism Among Federal Inmates Trained as Volunteer Prison Ministers*, 22 J. Offender Rehab. 97 (1995)..... 14, 16

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David Cole, *Faith Succeeds Where Prison Fails*, N.Y. Times, Jan. 31, 2001 15-16

Dep't of Corr. Transitional Servs. Div., *Volunteer Programs*, *at* http://www.oregon.gov/DOC/Trans/religious_services_/rs_vision02.shtml (last viewed Dec. 15, 2004) 15

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INTEREST OF THE *AMICI*

Amici curiae, whose identities and individual statements of interest are provided in the Appendix, are current and former prison chaplains, former state corrections officials, current state prisoners, and private religious and civil rights organizations.[1] *Amici*'s diverse experiences with prison-related issues lead them to the common conclusion that the provisions of the Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 ("RLUIPA") (codified at 42 U.S.C. § 2000cc *et seq.*), at issue in this case are not only sound as a matter of constitutional law, but very important as a matter of public policy.[2]

Specifically, *amici* believe the elimination of undue governmental constraints on religious exercise by prisoners is a worthy and important goal that can inure to the benefit not only of those in confinement, but of the wider society as well. This goal, moreover, can be realized without significantly burdening prison administrators and without compromising prison safety and security—as demonstrated by experience with RLUIPA itself, with the federal Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 ("RFRA") (codified at 42 U.S.C. § 2000bb *et seq.*), and with numerous religious accommodation policies voluntarily undertaken by the States themselves. *Amici* submit this brief because the resolution of this case will decide the fate of a key safeguard of prisoners' religious freedom.

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[1] Pursuant to Rule 37, letters of consent from the parties have been filed with the Clerk of the Court. In accordance with Rule 37.6, *amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amici*, has made a monetary contribution to the preparation or submission of this brief.

[2] In this brief, unless otherwise noted, "RLUIPA" refers to section 3 of the statute, 42 U.S.C. § 2000cc-1, which contains the provisions relating to institutionalized persons.

SUMMARY OF THE ARGUMENT

In RLUIPA, Congress acted to encourage the States to extend to state prisoners an important protection that Congress had previously granted to federal prisoners in the Religious Freedom Restoration Act. The various legal challenges to that effort will be ably and fully rebutted by the parties to this case and by other *amici curiae*. Accordingly, rather than attempt a comprehensive defense of RLUIPA, this brief will draw on *amici*'s diverse experiences with religious exercise in prisons generally, and with RLUIPA specifically, to make two narrow but important points.

First, RLUIPA was designed to further, and does in fact further, important objectives that "provide for the . . . general Welfare" (U.S. Const. art. I, § 8), are closely related to the federal interest in funding state prisons, and are wholly consistent with the Establishment Clause.

As to the latter, this Court has long taught that the accommodation of religious practice by private actors is, by itself, a legitimate secular purpose of legislation for Establishment Clause purposes. RLUIPA was enacted for that purpose, and in that respect is in line with the many legislative accommodations of religious exercise that this Court has upheld over the years. Correlatively, RLUIPA furthers the legitimate secular goal of ensuring that federal tax dollars are not used in a way that undermines federal policy on religious freedom.

But these are not the only ways in which RLUIPA furthers the general welfare. Congress also understood that, for many prisoners, the ability to practice their faiths plays a central role in their ability to rehabilitate themselves while in prison and after release. Accordingly, by promoting religious accommodation in prisons, RLUIPA promotes the important secular objective of helping to rehabilitate religiously inclined prisoners and ex-prisoners. This too is a valid, secular purpose, and its effectuation is therefore a permissible effect.

Second, RLUIPA accomplishes these congressional objectives in a way that does not undermine the compelling interests of prison administrators in maintaining order and security in their institutions. The fear of skeptics and critics of RLUIPA (and of RFRA before it) that the legislation would open the door to a flood of bogus and disruptive claims has not materialized. To the contrary, the statute was expressly designed *not* to condone specious claims and *not* to interfere with the States' obviously compelling interest in prison security—and it has not done so.

One reason for that is that the courts have proven well able to separate the wheat from the chaff. They routinely dismiss RLUIPA claims that either are insincere or would pose a credible threat to prison order or safety. Moreover, as illustrated by the claims of the state prisoners who have joined this brief (and who prevailed in the other courts of appeals that have upheld RLUIPA), the typical claim under RLUIPA is not the manipulative or disruptive gambit foreseen by some opponents of the statute. It is, rather, a reasonable request for accommodation of a benign religious ritual or practice—such as a kosher diet or access to prayer oil. Nor has RLUIPA inaugurated a wave of vexatious litigation; in fact, the statute's passage saw no discernible increase in the volume of prisoner lawsuits.

In short, the accommodation of religious liberty that RLUIPA promotes is both permissible as a matter of constitutional law and sound—or at the very least reasonable—as a matter of public policy. The Sixth Circuit erred in refusing to respect the legitimate policy choices that Congress made when it passed this important statute.

ARGUMENT

I. RLUIPA FURTHERS IMPORTANT SECULAR OBJECTIVES THAT ARE CLOSELY RELATED TO THE FEDERAL INTERESTS SERVED BY PRISON FUNDING.

As this Court has held repeatedly, the accommodation of religious exercise is a legitimate secular purpose that does not offend the Establishment Clause. See, *e.g.*, *Corporation of Presiding Bishop* v. *Amos*, 483 U.S. 327, 335 (1987) ("it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions") (citing and applying *Lemon* v. *Kurtzman*, 403 U.S. 602, 612 (1971)). The logical corollary, equally grounded in this Court's decisions, is that the alleviation of government-imposed burdens on religious exercise is a permissible *effect* of legislation under the Establishment Clause. See *id.* at 336-37 (citing *Lemon*, 403 U.S. at 612). It could hardly be otherwise; it would be an odd rule indeed that a purpose is permissible but its realization is not. Cf. *Case* v. *Bowles*, 327 U.S. 92, 102 (1946) ("Since the decision in *McCulloch* v. *Maryland*, it has seldom if ever been doubted that Congress has power in order to attain a legitimate end . . . to use all appropriate means plainly adapted to that end, unless inconsistent with other parts of the Constitution.") (internal citation omitted). Accordingly, this Court's decisions leave no doubt that the easing of state-imposed burdens on private religious practice does not have the "principal or primary effect" of advancing religion. *E.g.*, *Amos*, 483 U.S. at 336-37; *Walz* v. *Tax Comm'n*, 397 U.S. 664, 668 (1970).

As explained below, RLUIPA has both the purpose and the principal effect of lifting (or encouraging States to lift) government-imposed burdens on religious exercise by prisoners, while at the same time ensuring that programs supported by federal tax dollars do not unnecessarily thwart religious exercise. RLUIPA also furthers the important objective of facilitating the rehabilitation of prisoners in whose lives religion plays an important role. All of these are permissible purposes and effects for purposes of the Establishment Clause. For purposes of the Spending Clause, all of these objectives likewise promote the general welfare and are plainly "related" to the "federal interest" in funding state prison programs. *South Dakota* v. *Dole*, 483 U.S. 203, 207 (1987) (quoting *Massachusetts* v. *United States*, 435 U.S. 444, 461 (1978) (plurality op.)).

A. RLUIPA Furthers the Secular Objectives of Accommodating Religious Fellowship and Worship and of Ensuring that Federal Tax Dollars Are Not Used to Thwart Religious Exercise.

1. The cardinal purpose of RLUIPA—"alleviation of government burdens on prisoners' religious exercise," *Madison* v. *Riter*, 355 F.3d 310, 317 (4th Cir. 2003)—is a legitimate secular objective sanctioned by this Court's long-standing Establishment Clause jurisprudence. As this Court reaffirmed only last term, there is ample room for "play in the joints" between the Establishment Clause and the Free Exercise Clause of the First Amendment. *Locke* v. *Davey*, 124 S. Ct. 1307, 1311 (2004); see also *Walz*, 397 U.S. at 669. Thus, "[t]he limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." *Walz*, 397 U.S. at 673. *Accord Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1, 18 n.8 (1989) (plurality op.) (disclaiming the proposition that all "benefits conferred exclusively upon religious groups or upon individuals on account of their religious beliefs are forbidden by the Establishment Clause unless they are mandated by the Free Exercise Clause"). Accordingly, even without a predicate free exercise violation, "[u]nder the *Lemon* analysis, it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations"—and individuals as well—"to define and carry out

their religious missions." *Amos*, 483 U.S. at 335. And Congress therefore has "ample room under the Establishment Clause" to lift governmentally imposed burdens on private religious exercise. *Id.* at 334.

The achievement of that purpose is also a permissible "effect" for purposes of the *Lemon* analysis, as a comparison to *Amos* demonstrates. In *Amos*, the Court found not only that accommodating religion was a valid secular purpose, but that the specific exemption at issue there—the Title VII exemption for religious employers—did not violate the other two parts of the *Lemon* test. As to the "effects" inquiry, the Court held that the exemption did not have the principal or primary effect of advancing religion because Congress itself was not advancing religion: "For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence." *Id.* at 337. Rather, the Title VII exemption "allows *churches* to advance religion, which is their very purpose," *id.* (emphasis added, emphasis in original omitted), and the exemption cannot be unconstitutional for that reason.[3]

Contrary to the Sixth Circuit's analysis, *Cutter* v. *Wilkinson*, 349 F.3d 257, 263-64, 267 (6th Cir. 2004), RLUIPA satisfies the effects requirements of *Lemon* even more readily than did the Title VII exemption in *Amos*. In eliminating unnecessary government interference with religious exercise, RLUIPA does not—as a facial matter—have the primary effect of advancing religion. Instead, by its terms RLUIPA simply helps religious prisoners *themselves* exercise their liberty to practice their faiths. No government "activities and

[3] Furthermore, the exemption created no excessive entanglement of church and state because it "effectuate[d] a more complete separation of the two and avoid[ed] the kind of intrusive inquiry into religious belief." 483 U.S. at 339.

influence" are necessarily enlisted to advance the cause of religion. 483 U.S. at 337.[4]

It also bears emphasizing that, despite the wide range of religious practices to which RLUIPA applies, see *Cutter*, 349 F.3d at 263, the statute is far narrower than the Title VII exemption in one crucial respect. The Title VII exemption applies categorically to all activities of non-profit religious employers whether or not the activities are directly related to the employer's religious operations. See *Amos*, 483 U.S. at 332 n.9 (describing 1972 amendment to Title VII expanding the scope of the exemption); see also 42 U.S.C. § 2000e-1. Despite some prior suggestions that such "exceptionless" accommodations may in some circumstances violate the Establishment Clause, see *Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703, 709-10 (1985), the *Amos* Court upheld the Title VII exemption.

By comparison, the accommodation of religious practice mandated by RLUIPA is less exacting because the rights secured by RLUIPA are contingent on the institution's ability to maintain order and security. By allowing a prison to defeat a claim under the statute's compelling interest standard, Section

[4] To be sure, accommodation of religious exercise, like everything else in prison, requires some action by the State. That is the nature of prison; a prisoner cannot do anything—eat, sleep, shower, read, write, have a phone conversation—without the State's active involvement. But within that necessarily hands-on environment, RLUIPA calls on the State to assume a decidedly hands-*off* posture relative to religious practice: not to become involved in religious exercise, but to make reasonable allowances for private religious exercise. The fact that such allowances, like everything in prison, may entail some affirmative steps by the State has no bearing on the constitutional analysis.

Similarly, there can be no serious argument that RLUIPA somehow creates an impermissible entanglement of church and state. On the contrary, RLUIPA requires prison officials to accommodate all religious believers (including minority believers) in a neutral fashion, and that neutrality helps to avoid situations in which interference with particular religious practices might yield an excessive entanglement.

3 of RLUIPA forges a balance between prisoners' important interest in exercising religion and compelling interests of the State. 42 U.S.C. § 2000cc-1(a) (setting forth compelling interest standard); see also *infra* Section II. And, unlike the sometimes significant burdens on others that are entailed by the Title VII exemption in *Amos*, the burdens RLUIPA imposes on prison administrators are quite modest, usually involving little more than a reallocation of allotted resources. Thus, RLUIPA's satisfaction of the "purpose" and "effects" analyses required under *Lemon* follows *a fortiori* from *Amos*.

2. RLUIPA also furthers the related secular objective of ensuring that federal tax dollars do not support state programs that unnecessarily thwart religious exercise. As one commentator put it during the congressional hearings, "[t]he Federal interest here is simply . . . that Federal funds should not be used unnecessarily to impose burdens on religious exercise." *Hearing Before the Senate Comm. on the Judiciary: Issues Relating to Religious Liberty Protection, and Focusing on the Constitutionality of a Religious Protection Measure*, 106th Cong. 73 (1999) ("*Hearing*") (statement of Douglas Laycock, University of Texas School of Law). As the Ninth Circuit has recognized, "Congress has a strong interest in making certain that federal funds do not subsidize conduct that infringes individual liberties, such as the free practice of one's religion. . . . Congress may allocate federal funds freely, then, to protect the free exercise of religion . . . ." *Mayweathers* v. *Newland*, 314 F.3d 1062, 1067 (9th Cir. 2002), *cert. denied sub nom. Alameida* v. *Mayweathers*, 124 S. Ct. 66 (2003). *Accord Charles* v. *Verhagen*, 348 F.3d 601, 608-09 (7th Cir. 2003). Or, as the Eleventh Circuit recently put it, even where a state prison is not violating inmates' federal free exercise rights, "Congress has every right to ensure that state prisons that accept federal funds respect the religious freedom of prisoners." *Benning* v. *Georgia*, Nos. 04-10979 & 04-11044, 2004 WL 2749172, at *6 (11th Cir. Dec. 2, 2004).

Indeed, Congress may legitimately act to ensure that federal funds are not used to inhibit religious exercise just as surely as the federal government may administer federal lands in a manner that does not obstruct religious practices. See *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 454 (1988) ("The Government's rights to the use of its own land . . . need not and should not discourage it from accommodating religious practices like those engaged in by the Indian respondents."). In fact, Congress has enacted legislation requiring the federal government to protect the rights of Native Americans to exercise traditional religions through "access to sites" and "the freedom to worship through ceremonials and traditional rites." American Indian Religious Freedom Act, Pub. L. No. 95-341, § 1, 92 Stat. 469, 469 (1978) (codified at 42 U.S.C. § 1996). Similarly, the executive branch has directed that, in managing federal lands, responsible executive branch agencies shall, to the extent practicable, "(1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites." Exec. Order No. 13,007, § 1, 61 Fed. Reg. 26,771, 26,771 (May 24, 1996). Just as the federal government may accommodate religious exercise through the administration of federal lands—a practice this Court sanctioned in *Lyng*—so too may Congress promote the general welfare by advancing the accommodation of religious exercise through federal funding.

For all these reasons, ensuring the appropriate use of federal funds is yet another valid secular purpose and effect of RLUIPA. And it is obviously closely related to the "federal interest" in funding state prisons, which would be undermined if those prisons used fungible federal funds, in part, to thwart federal policy on religious freedom. *Dole*, 483 U.S. at 207.

B. By Promoting the Accommodation of Religious Exercise in Prisons, RLUIPA Facilitates the Important Objective of Prisoner Rehabilitation.

Apart from the legitimate Congressional interest in freedom of religion as such, the accommodation of religious exercise in prisons produces significant corollary benefits, which Congress recognized in passing RLUIPA and which the statute demonstrably advances. Incarceration imposes profound handicaps on the ability of religious individuals to observe their faiths. Apart from private prayer, even the most basic forms of religious exercise, such as worship and devotional study—let alone such things as religiously mandated diet and dress—simply are not possible without the state's affirmative acquiescence.

One consequence is that persons for whom religion provides solace and stability are deprived of that outlet, and in a circumstance in which they may need solace and stability more than ever. As one prison administrator put it, prisoners "'don't have many hope pegs to hang your being on' . . . 'Religion is one of those hope pegs.'" Ari Goldman, *Sing Sing Inmates Hail Plan to Offer Kosher Meals*, N.Y. Times, Sept. 6, 1993, at 20.

Unsurprisingly, then, to the extent religiously inclined prisoners are relieved of the burden on religious exercise that ordinarily accompanies incarceration, those prisoners tend to be better equipped to deal with the severity of imprisonment, and more well-adjusted both in prison and out, than they would be without that accommodation. Indeed, as shown below, a growing body of research indicates that, for prisoners for whom religion is an important part of life, accommodating religious exercise tends both to ease the adjustment to prison life and to facilitate rehabilitation. By ensuring that the exercise of religion behind prison walls is not unnecessarily fettered, RLUIPA advances these important objectives.[5]

1. Accommodation of Religious Exercise Aids Rehabilitation by Helping Prisoners Adjust to Prison and by Improving Prison Order.

In the experience of *amici*, one of the principal roles that religious accommodation can play in prisons is to help prisoners adjust to the harshness of the prison environment. In debating the legislation that became RLUIPA, even opponents of the statute conceded the important rehabilitative role played by accommodating religious exercise.

> [E]very correction administrator in the country recognizes the vital role played by most religious practices and beliefs in furthering inmate rehabilitation, in maintaining a sense of hope and purpose among individual inmates and in enhancing overall institutional safety and well-being. Most inmates who sincerely practice their religious beliefs do not pose institutional problems. Rather, as a rule of thumb, they promote institutional stability.

Hearing, at 175 (statement of Glenn S. Goord, Commissioner, New York State Department of Correctional Services).

Recent studies indicate that religious accommodation is profoundly important to the rehabilitation of many prisoners. For one thing, those studies show that genuine religious practice is widespread, deeply influencing the day-to-day lives of a great many prisoners. For example, a major study of relig-

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[5] This is not to say that religious accommodations are valuable only—or even primarily—because of their instrumental value. Religious liberty is the first freedom guaranteed by the Bill of Rights, and accommodating religion is inherently important. *See, e.g.*, *Amos*, 483 U.S. at 334 (noting history of protection for religious freedom in the United States). Thus, even if a particular religious exercise produced no rehabilitative or other impact on prisoners or society at large, accommodating that religious exercise would always be an invaluable protection of prisoners' civil rights.

ious activity in a large South Carolina prison found that "[r]eligious practice in prison can be very extensive with about 50% of inmates attending religious services an average of six times per month." Thomas P. O'Connor & Michael Perreyclear, *Prison Religion in Action and Its Influence on Offender Rehabilitation*, 35 J. Offender Rehab. 11, 28 (2002). And a recent census of Oregon state prisoners showed that 52 percent of them are involved in religious activities. Thomas P. O'Connor et al., *Home for Good in Oregon: A Community, Faith and State Re-entry Partnership to Increase Restorative Justice*, Corrections Today, Oct. 2004, at 73, *available at* http://www.oregon.gov/DOC/TRANS/docs/pdf/home_4_good.pdf; see also Bryon R. Johnson et al., *Religious Programs, Institutional Adjustment, and Recidivism Among Former Inmates in Prison Fellowship Programs*, 14 Just. Q. 145, 146 (1997) (noting that a 1991 survey showed that "nearly one inmate in three is involved in religious programs").

The evidence suggests, and *amici*'s own experience confirms, that such activities have a substantial impact. A national study of the role of religion in the adjustment to prison, which surveyed prisoners at 20 prisons, found that religiosity (measured as a composite of religious activity, attitudes, and beliefs) was positively correlated with self-esteem and with the degree to which prisoners felt adjusted to prison. Todd R. Clear & Melvina T. Sumter, *Prisoners, Prison, and Religion: Religion and Adjustment to Prison*, 35 J. Offender Rehab. 127, 150-51 (2002). These religiously active prisoners were also less likely to suffer from depression. *Id.* at 151; *see also* Harry R. Dammer, *The Reasons for Religious Involvement in the Correctional Environment*, 35 J. Offender Rehab. 35, 41 (2002) (describing how many prisoners achieve "peace of mind" from religious observance, which is "important for the psychological survival of inmates").

The benefits of religious accommodation extend beyond the religious prisoners themselves. One study found that religiosity is often a "principal determinant" in the number of disciplinary infractions that a prisoner receives, with fewer infractions among those prisoners who have greater religious activity and belief. Clear & Sumter, *supra*, at 154. These findings mirror those of the South Carolina study, which concluded that "the more religious sessions an inmate attended, the less likely he was to have an [in-prison] infraction." O'Connor & Perreyclear, *supra*, at 26.[6]

The recent experience of a California prison provides another stark example of the potential impact of religious accommodation on prisoners' adjustment to prison life. That prison, which had long been plagued by gang violence, experienced a sharp drop in the number of riots and other violent incidents after a large group of its prisoners participated in a religious studies program. Don Thompson, *Officials: Prison Program Answer to Our Prayers*, Miami Herald, May 13, 2004, at 7. As one administrator put it, the religious program within that prison "'has definitely played a role'" in reducing in-prison violence. *Id.*

2. Accommodation of Religious Exercise in Prison Furthers the Objective of Reducing Recidivism.

In the experience of *amici*, religious accommodation also reduces recidivism among those who choose to participate in religious services and other activities. And once again, this experience is supported by the available evidence. See O'Connor & Perreyclear, *supra*, at 28-29.

For example, a study comparing recidivism rates of prisoners participating in an intensive prison ministry

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[6] The few studies that have detected no statistical differences in prisoner behavior typically were not measuring overall religious participation but were instead comparing participants within a specific program versus those without. *See, e.g.*, Johnson et al., *supra*, at 149-50; Bryon R. Johnson, *Religious Programs and Recidivism Among Former Inmates in Prison Fellowship Programs: A Long-Term Follow-Up Study*, 21 Just. Q. 329, 336-38 (2004).

program with the general prison population found significantly lower long-term (eight- to fourteen-year) recidivism rates among program participants. Mark C. Young et al., *Long-Term Recidivism Among Federal Inmates Trained as Volunteer Prison Ministers*, 22 J. Offender Rehab. 97, 104, 110-11 (1995). Another study, using follow-up data on prisoners who had been incarcerated in twelve prisons around the country, found that those who had participated regularly in religious activities had significantly lower recidivism rates in the six and a half years following their release. Melvina T. Sumter, *Religiousness and Post-Release Community Adjustment, Graduate Research Fellowship—Executive Summary* 10 (Sept. 25, 2000), *available at* http://www.ncjrs.org/pdffiles1/nij/grants/184509.pdf. And a study of participants in a ministry operating in four New York state prisons found that greater participation was linked to lower rates of re-arrest in the year following the prisoners' release. Johnson et al., *supra*, at 160. Indeed, one commentator opined that "[s]piritual development and religious study are perhaps 'the most valuable tools for rehabilitation and to prevent recidivism.'" Jamie Aron Forman, Note, *Jewish Prisoners and Their First Amendment Right to a Kosher Meal: An Examination of the Relationship Between Prison Dietary Policy and Correctional Goals*, 65 Brook. L. Rev. 477, 484 & n.45 (1999) (quoting *Hearings on the Need for Fed. Prot. of Religious Freedom After Boerne v. Flores Before the Comm. on the Judiciary*, 105th Cong. 5 (1998) (statement of Isaac M. Jaroslawicz, Director of Legal Affairs for the Aleph Institute)).

Congress clearly had in mind such secular benefits when it sought to promote the accommodation of religion in the prison context. As one Senator put it, accommodating the religious practices of prisoners "helps rehabilitate them and makes them less likely to commit crime after they are released." *Hearing* at 20 (statement of Sen. Strom Thurmond).

Many of the benefits of religious exercise in prison can be traced to the extensive contact between prisoners and volunteers, who tend to be "a group of people who ha[ve] learned how to successfully negotiate and derive satisfaction from the different worlds of work, family, education, politics, and religion." O'Connor & Perreyclear, *supra*, at 20. Given that "offenders tend to have trouble negotiating these areas of life, and . . . problems in these areas are predictive of crime and recidivism," positive interactions with volunteers fills a crucial need in many prisoners' lives. *Id.* *Amici*'s own experience confirms that religious volunteers are important exemplars of social stability for prisoners.

Religiously-motivated volunteers, moreover, make up the largest cohort of volunteers working in prisons. For example, 77 percent of the volunteers in the Oregon prison system last year were associated with the Religious Services department. See Dep't of Corr. Transitional Servs. Div., *Volunteer Programs*, available at http://www.oregon.gov/DOC/TRANS/religious_services/rs_vision02.shtml (last viewed Dec. 15, 2004). The 1500 volunteers associated with Religious Services donated over 100,000 hours of work, the equivalent of 55 full-time employees. *Id.* Similarly, the South Carolina study found that "232 [religious] volunteers donated about 21,316 hours of work to the prison: the equivalent of 11 full-time paid positions." O'Connor & Perreyclear, *supra* at 23; see also *Hearing Before the Subcomm. on Terrorism, Tech., and Homeland Sec. of the Senate Comm. on the Judiciary*, 108th Cong. 32 (2003) (statement of Paul Rogers, President, American Correctional Chaplains Association) (noting that "[o]f civilians who choose to participate in various prison activities, the vast majority is Religious Program volunteers"). Indeed, "in many prisons, the *only* groups engaged in rehabilitative programs are religious ones." David

Cole, *Faith Succeeds Where Prison Fails*, N.Y. Times, Jan. 31, 2001, at A21.[7]

Furthermore, prisoners' involvement in religious activities allows them to interact with prison chaplains, a group institutionally dedicated to the goal of prisoner rehabilitation. Jody L. Sundt & Francis T. Cullen, *The Correctional Ideology of Prison Chaplains: A National Survey*, 30 J. Crim. Just. 369, 377-78 (2002). In *amici*'s experience, regular, voluntary contact with prison chaplains likewise tends to reduce both short-term and long-term recidivism.

Further study is required to understand fully the dynamics at work here. But the evidence, confirmed by *amici*'s own experience, demonstrates that voluntary religious programs are "a potent and a cost-effective resource in the national effort to reduce the negative effects of crime on individuals and the community." Young et al., *supra*, at 115. Taken together, current research suggests that these programs "must be considered in the mix of variables and 'best correctional practices' related to offender rehabilitation," O'Connor & Perreyclear, *supra*, at 30. Indeed, at a time when "we have all but given up on rehabilitation as 'soft on crime,'" voluntary religious programs offer an important alternative for rehabilitating prisoners in preparation for their re-entry into society. Cole, *supra*, at A21.

For all these reasons, the accommodation of religious exercise in prison—within relevant constitutional limits—is of surpassing importance. It is a legitimate secular purpose and effect for purposes of the Establishment Clause. And it promotes the general welfare in a way that is closely related to the federal interest in supporting state prisons, including the

[7] Such volunteer programs are also cost-effective. While other effective rehabilitation programs cost in the range of $14,000 per prisoner per year, the South Carolina study found that the annual cost of programs using religious volunteers "could be considered a bargain at about $150 to $250 per inmate served." O'Connor & Perreyclear, *supra*, at 23.

strong federal interest in rehabilitation. See *Dole*, 483 U.S. at 207.

Congress, therefore, was right to decide that accommodation of religious exercise would make valuable contributions to the penal system as well as the lives of individual prisoners. At a minimum, that judgment was a reasonable one, and the Sixth Circuit erred in second-guessing it.

II. RLUIPA'S STRICT SCRUTINY STANDARD HARMONIZES RELIGIOUS ACCOMMODATIONS WITH THE STATES' COMPELLING INTERESTS IN PRISON SECURITY AND ORDER.

Notwithstanding the important benefits RLUIPA provides to prisoners and society, opponents of the statute maintain that it is unwise and dangerous as a matter of policy. Such arguments take several forms, but the common motif is that the statute threatens prison order and security by upsetting the balance of power between prisoners and administrators.

Aside from their irrelevance to the constitutional questions before the Court,[8] these criticisms are demonstrably wrong as a factual matter. Despite the rhetorical force of the image of mass conversion to the "Church of the Filet Mignon"—or, more gravely, racist and dangerous activity undertaken under the banner of religion—the reality is far different. As illustrated by the claims of the prisoner *amici* here, typical claims brought under RLUIPA are in fact sincere, modest, and be-

[8] For one thing, arguments of those sort are, at bottom, a policy dispute with Congress. For another, they generally constitute as-applied challenges masquerading as facial challenges. *See, e.g.*, Brief of Ohio and Other States as *Amici Curiae* at 3-8, 17-18, *Benning* v. *Amideo*, 2004 WL 2749172 (11th Cir. Dec. 2, 2004) (Nos. 04-10979 & 04-11044) (discussing the potential for prison violence that inheres in some ostensibly religious objects and practices, and asserting that violent prisoners sometimes manipulate and abuse religious rights). The question whether a *particular* accommodation should be granted under RLUIPA is not relevant to the facial challenge at issue here.

nign. And RLUIPA leaves the States with ample legal tools to handle any risks that religious accommodation might otherwise create in the prison setting.

1. As a factual matter, there is little support for the cynical view that prisoners resort to religion to secure special consideration from authorities. In one recent study, researchers were surprised to find very little evidence suggesting that prisoners were opportunistically using religion to achieve privileges or fewer restrictions inside their facilities. Todd R. Clear et al., *The Value of Religion in Prison: An Inmate Perspective*, 16 J. Contemp. Crim. Just. 53, 63 (2000). According to these researchers, "[r]eligiously active inmates flatly denied that they received special treatment by parole or prison authorities." *Id.* Significantly, even non-religious prisoners doubted that religious activity actually led to special favors within the prison. *Id.*

If anything, religious exercise often involves burdens that a prisoner would not undertake in the absence of authentic religious faith. To cite a common example, the kosher requirements of some prisoners are frequently accommodated with a cold "common fare" meal. The religious prisoner must therefore sacrifice a hot meal in favor of a cold one that does not violate religious dietary laws. Fasting and other ascetic traditions that can be accommodated in prison similarly entail significant sacrifices on the part of the prisoner. And, prisoners professing religious beliefs are sometimes subject to taunts and derisive comments by other, non-religious prisoners.

In these and other ways, an expressed desire for a religious accommodation—which is a predicate for a claim under RLUIPA—carries with it costs and burdens that will themselves have a tendency to discourage phony claims. Cf. *University of Great Falls* v. *NLRB*, 278 F.3d 1335, 1344 (D.C. Cir. 2002) (noting that the costs associated with religious identification "will act as a check on institutions that falsely identify themselves as religious merely to obtain exemption from the [National Labor Relations Act]."). Thus, as the

available evidence shows (and as the experience of *amici* confirms), there is in reality little risk that prisoners would, to any significant degree, engage in sham religious exercises or expressions of religious belief.

2. In the experience of *amici*, moreover, the vast majority of claims under RLUIPA involve religious practices that pose no colorable threat to prison order or security. The anecdotes and hypotheticals often invoked by RLUIPA's opponents are far less typical than the claims brought by the prisoner *amici* here, who prevailed in the other federal courts of appeals that have upheld RLUIPA's constitutionality. See *Benning*, 2004 WL 2749172; *Madison*, 355 F.3d at 317-22; *Charles*, 348 F.3d at 611; *Mayweathers*, 314 F.3d 1062. Those cases involved requests for a kosher diet (Ira Madison and Ralph Benning); for prayer oil (Jerry Charles); for permission to attend weekly religious services (the *Mayweathers* plaintiffs); for permission to wear a yarmulke (Mr. Benning); and for permission to wear religiously significant beards (the *Mayweathers* plaintiffs).[9]

Although these kinds of requests pose no colorable threat to prison security, they are often denied by prison administrators. As two of RLUIPA's Senate sponsors put it, "prison officials sometimes impose frivolous or arbitrary rules. Whether from indifference, ignorance, bigotry, or lack of re-

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[9] *See also, e.g.*, *Agrawal* v. *Briley*, No. 02 C 6807, 2003 WL 22839813, at *3 (N.D. Ill. Nov. 25, 2003) (denying motion to dismiss RLUIPA claim by Hindu prisoner for religious diet); *Gordon* v. *Pepe*, No. Civ.A.00-10453-RWZ, 2004 WL 1895134, at *4 (D. Mass. Aug. 24, 2004) (allowing RLUIPA claim for religiously motivated vegetarian diet); *Boles* v. *Neet*, 333 F. Supp. 2d 1005, 1010 (D. Colo. 2004) (allowing RLUIPA claim for refusal to allow Jewish prisoner to wear religious garments while being transported for medical treatment); *Goodman* v. *Snyder*, No. 00 C 0948, 2003 WL 22765047 (N.D. Ill. Nov. 20, 2003) (allowing RLUIPA claim for religious diet and tarot cards); *cf. Aiello* v. *Frank*, No. 03-C-0127-C, 2003 WL 23277415, at *1 (W.D. Wis. June 3, 2003) (granting prisoner leave to state RLUIPA claim for denial of tallith, yarmulke, and prayer book).

sources, some institutions restrict religious liberty in egregious and unnecessary ways." 146 Cong. Rec. S7774, S7775 (daily ed. July 27, 2000) (joint statement of Senators Hatch and Kennedy ("Joint Statement")).

Moreover, relief often cannot be had under the First Amendment alone, which requires only that a prison regulation be "reasonably related to legitimate penological interests." *Turner* v. *Safley*, 482 U.S. 78, 89 (1987). See, *e.g.*, *DeHart* v. *Horn*, No. 03-4250, 2004 WL 2709924, at *6, *11 (3d Cir. Nov. 30, 2004) (affirming grant of summary judgment for defendants on Buddhist prisoner's First Amendment claim for religious diet, citing "the Prison's legitimate interest in efficient food provision" and finding that accommodation would impose more than "a minimal burden on the Prison," but remanding for consideration of corresponding claims under RLUIPA); cf. *Hammons* v. *Saffle*, 348 F.3d 1250, 1255-58 (10th Cir. 2003) (affirming grant of summary judgment for defendants as to prisoner's First Amendment claim based on denial of access to prayer oil, but remanding to the district court for consideration of identical claim under RLUIPA). Thus, in the run of cases, RLUIPA satisfies a substantial need for prisoner-claimants while posing very little risk to sound prison administration.

3. Just as importantly, RLUIPA erects substantial obstacles that prisoners must overcome before they can win an accommodation. And the track record of both RLUIPA and RFRA, which is identical to RLUIPA in the relevant respects,[10] shows that those obstacles are both real and effective at preserving prison security and discipline.

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[10] *See* 42 U.S.C. § 2000bb-1(b) (RFRA § 3(b)) ("Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.").

First, the statute places on the prisoner the burden of establishing both the sincerity of his religious claim and the substantial burden imposed by the challenged regulation. 42 U.S.C. § 2000cc-2(b) ("the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion"); see also *Murphy* v. *Missouri Dep't of Corr.*, 372 F.3d 979, 988 (8th Cir.) ("RLUIPA requires that Murphy show, as a threshold matter, that there is a substantial burden on his ability to exercise his religion."), *cert. denied*, 125 S. Ct. 501 (2004). This is not empty verbiage: under both RLUIPA and RFRA, the courts have proved perfectly capable of filtering out insincere claims and insubstantial burdens at the pleading or summary judgment stage. See, *e.g.*, *Boyd* v. *Arizona*, 87 F.3d 1317 (9th Cir. 1996) (table), 1996 WL 341273, at *2 (affirming grant of summary judgment in favor of prison officials who had denied prisoner's request under RFRA to "study scriptures with his wife daily, hold family prayer with his wife daily, . . . and render physical affection to his wife while he is in prison"); *Rogers* v. *Hellenbrand*, No. 03-C-230-C, 2004 WL 433976, at *1, *6 (W.D. Wis. Mar. 4, 2004) (granting partial summary judgment on prisoner's RLUIPA claim predicated on supposedly religious "auditory and visual hallucinations," where "plaintiff has failed even to adduce evidence identifying his religious beliefs or indicating how he practices or observes his religion"), *aff'd*, No. 04-1918, 2004 WL 2698957 (7th Cir. Nov. 24, 2004); *Winters* v. *State*, 549 N.W.2d 819, 820-21 (Iowa 1996) (affirming dismissal of RFRA claim by white supremacist prisoner that sharing a cell with an African-American prisoner substantially burdened his religious exercise); *Loden* v. *Peters*, No. 92 C 20209, 1995 WL 89951, at *10 & n.4 (N.D. Ill. Mar. 1, 1995) (under RFRA, holding that denial of prisoner's request to worship nude in a prison chapel did not substantially burden his religious exercise).

Second, the rights secured by RLUIPA (in contrast to many religious exemptions) are not absolute but contingent. Far from creating an unconditional right to religious exercise, RLUIPA explicitly assigns countervailing weight to the burdens on prison administrators. Because the statute's "compelling interest" and "least restrictive means" inquiries are inherently contextual, their application to a given case will necessarily take account of any relevant institutional exigencies. As the Senate sponsors of RLUIPA explained, "[t]he compelling interest test is a standard that responds to facts and context." Joint Statement, 146 Cong. Rec. at S7774, S7775.

The compelling interest standard leaves ample room for deference to prison officials on matters of prison security. Indeed, RLUIPA's Senate sponsors clearly indicated their expectation "that courts will continue the tradition of giving due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources." *Id.* at S7775 (internal quotation marks omitted).

The lower courts, moreover, have had no difficulty acting in accordance with this expectation. As the Seventh Circuit aptly noted in a RFRA decision that applies equally to RLUIPA, "maintaining order in prisons is a compelling governmental interest and one that frequently requires and so justifies limitations on freedom of religious conduct." *Mack* v. *O'Leary*, 80 F.3d 1175, 1180 (7th Cir. 1996), *vacated on other grounds*, 522 U.S. 801 (1997); accord *Hamilton* v. *Schriro*, 74 F.3d 1545, 1554 (8th Cir. 1996) ("a court applying RFRA must give due deference to the expertise of prison officials in establishing regulations to maintain prison safety and security, even when the court applies a 'heightened' standard of review").

Here again, the substantial number of unsuccessful prisoner claims under RLUIPA and RFRA bear out Congress's expectation, even as they demonstrate that the strict scrutiny standard, faithfully applied to the special circumstances of a prison, amply protects the States' compelling interest in prison order and security. See, *e.g.*, *Charles* v. *Frank*, 101 Fed. App. 634, 636 (7th Cir.) (holding that denial of prisoner's request to wear prayer beads satisfied strict scrutiny because "suppressing the open display of religious emblems is necessary to stop gangs from usurping them as indicia of membership"), *cert. denied*, 125 S. Ct. 479 (2004); *Fawaad* v. *Jones*, 81 F.3d 1084, 1087 (11th Cir. 1996) (rejecting RFRA challenge to prison rule limiting prisoners' latitude in changing their names); *Ulmann* v. *Anderson*, No. Civ. 02-405-JD, 2004 WL 883221, at *8 (D.N.H. Apr. 26, 2004) (entering summary judgment for defendants on detainee's RLUIPA claim, holding that denial of request for a glass menorah for security reasons satisfied strict scrutiny); *Farrow* v. *Stanley*, No. CIV.02-567-B, 2004 WL 224602, at *10 (D.N.H. Feb. 5, 2004) (rejecting RLUIPA claim for a Native American sweat lodge because, *inter alia*, its use would require "intensive monitoring" and its construction "would require inmates to have access to tools that would create security concerns"); *Charles*, 220 F. Supp. 2d at 946-47 (granting summary judgment for prison officials on Muslim prisoner's RLUIPA claim based on denial of request for two annual religious feasts, citing compelling "security and resource concerns"); *Jones* v. *Roth*, 950 F. Supp. 254, 257-58 (N.D. Ill. 1996) (rejecting RFRA challenge to prison policy regulating the time and manner of prayer).

These decisions illustrate the seriousness with which reviewing courts take the States' interests in security and order. The claims in these cases (and many others) were rejected, not because the claimants had failed to show a substantial burden on religion, but because the challenged regulations were deemed narrowly tailored to the government's compelling interest in the safety and security of its prisons. Thus, not only insincere claims, but also sincere claims that colorably

threaten prison security, will fail on the merits—and typically on dispositive pre-trial motions.

4. Nor is there any support for the claim by RLUIPA's detractors that the statute will subject prison administrators to a flood of lawsuits. Indeed, in passing RLUIPA, Congress had before it a letter supporting RLUIPA's passage from the authorities overseeing federal prisons. The letter reported that, in the six years that the Bureau of Prisons ("BOP") had been required to apply RFRA—which applies the same substantial burden standard as RLUIPA—BOP had not been overwhelmed by frivolous prisoner lawsuits. The letter stated unequivocally that "RFRA has been in effect in the Federal Prison system for six years and compliance with that statute has not been an unreasonable burden to the Federal prison system." 146 Cong. Rec. at S7776 (July 19, 2000, letter from Assistant Attorney General Robert Raben to Sen. Orrin Hatch).

BOP's sanguine view was amply justified by the text of RLUIPA. To minimize the risk that claims under RLUIPA would lead to unreasonable litigation burdens, Congress expressly subjected such claims to the Prisoner Litigation Reform Act. See RLUIPA § 4(e), 42 U.S.C. § 2000cc-2(e) ("Nothing in this chapter shall be construed to amend or repeal the Prison Litigation Reform Act of 1995 (including provisions of law amended by that Act)."). The Prison Litigation Reform Act of 1995 ("PLRA")[11] cabins the prospective relief available to prisoners in civil actions related to prison conditions (PLRA § 802, 18 U.S.C. § 3626), requires exhaustion of administrative remedies prior to filing a lawsuit (PLRA § 803, 42 U.S.C. § 1997e), amplifies the procedural requirements for filing *in forma pauperis* actions (PLRA § 804, 28 U.S.C. § 1915), and adds a judicial screening mechanism to review

[11] Pub. L. No. 104-134, tit. VIII §§ 801-810, 110 Stat. 1321-66, 1321-66 to 1321-77 (1996) (codified in scattered sections of titles 18, 28, and 42 of the United States Code).

potentially frivolous actions (PLRA § 805, 28 U.S.C. § 1915A). As the Senate sponsors of RLUIPA noted, "[t]he Prison Litigation Reform Act is working effectively to control frivolous prisoner litigation across the board, without barring meritorious claims equally with frivolous ones." Joint Statement, 146 Cong. Rec. at S7775. By subjecting RLUIPA actions to the requirements of the PLRA, Congress ensured that courts and prison administrators would not be overwhelmed by new prisoner litigation.

In fact, as recent studies have shown, neither RLUIPA nor RFRA has had any measurable impact on the volume of prisoner lawsuits. *See* Margo Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. 1555, 1583 tbl. I.A, 1584 fig. I.A, 1586 fig. I.B (2003) (showing that the enactment of RFRA was not followed by a noticeable increase in the number of federal civil rights claims by prisoners (as a proportion of the overall prison population), and RLUIPA's enactment was in fact followed by a slight *decrease* in such suits); accord Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions*, 28 Harv. J.L. & Pub. Pol'y (forthcoming 2005) (finding that only 59 RLUIPA cases were filed in the 50 state prison systems in the four years following the statute's passage). Furthermore, as a general rule, statutory claims for religious accommodation are only a fraction of the prisoner claims faced by prison administrators. See Joint Statement at S7775 (citing studies showing "that religious liberty claims are a very small percentage of all prisoner claims, that RFRA led to only a very slight increase in the number of such claims, and that on average RFRA claims were more meritorious than most prisoner claims"); see also Lee Boothby & Nicholas P. Miller, *Prisoner Claims for Religious Freedom and State RFRAs*, 32 U.C. Davis L. Rev. 573 (1999). There is, therefore, no truth to the suggestion that RLUIPA has resulted in waves of frivolous or malicious actions from prisoners.

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In short, far from providing a basis to second-guess Congress's policy judgment, the evidence amply confirms that RLUIPA not only serves the important goal of protecting individual prisoners' rights to exercise their religion, but also serves the over-riding purpose of prisoner rehabilitation. The available evidence also confirms the judgment expressed by the Fourth Circuit "that RLUIPA should not hamstring [states'] ability" to maintain safety and order in [their] prisons. *Madison*, 355 F.3d at 321.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX

The **American Correctional Chaplains Association (ACCA)** is a national association of professional chaplains, founded in 1886 and affiliated with the American Correctional Association. The ACCA membership represents chaplains of all faith groups in federal, state and local jurisdictions. The mission of the ACCA is to serve as a professional organization for pastoral care personnel in the corrections field; provide a network for the sharing of information and resources amongst its members and with corrections administrators; to formulate standards for chaplaincy and religious programming in correctional facilities; develop and implement certification for correctional chaplains (recognized as the industry standard); and communicate the religious and spiritual aspects of corrections to the larger community.

Robert C. Lynn, a former president of ACCA, currently serves as treasurer of the Association's Northwest region and as pastor of the Skyline Christian Church in Takoma, Washington. He was Religious Program Administrator for the Washington State Department of Corrections for 14 years, and currently serves on the Department's Religious Advisory Committee. Rev. Lynn also served 31 years as an Air Force chaplain before retiring as Command Chaplain, Fourth Air Force, at the rank of Colonel.

Walter J. Dickey and Chase Riveland (collectively, the "**corrections *amici***") are former senior state corrections officials with extensive experience in prison management matters.

Mr. Dickey has served as Administrator of the Wisconsin Department of Corrections and as Chair of Governor Tommy Thompson's Task Force on Corrections, and as a member of the U.S. Justice Department's Sessions on Sentencing and Corrections. A widely published author on corrections issues, Mr. Dickey also has taught at the University of Wisconsin–Madison Law School since

1976.

Mr. Riveland has served as Secretary of Corrections for the State of Washington, Executive Director of the Colorado Department of Corrections, and Deputy Director of the Wisconsin Department of Corrections. Mr. Riveland currently teaches corrections-related courses at the National Institute of Corrections Academy in Colorado and serves as an independent corrections consultant.

Ralph Benning, Ira W. Madison, Jerry Charles, and the Prison Law Office (collectively, the "**prisoner *amici***") are prisoners or attorneys representing prisoners who have successfully defended the constitutionality of RLUIPA in every one of the cases—other than the decision below—to reach the federal circuit courts on this issue. The prisoner *amici* have directly benefited and continue to benefit from RLUIPA's promotion of religious accommodations in prison, and in three of their four cases, litigation under RLUIPA is ongoing.

Mr. Benning is a Georgia prisoner and "Torah observant Jew" who filed suit under RLUIPA when he was denied a kosher diet and a yarmulke. After Mr. Benning prevailed in a motion to dismiss in the district court, Georgia sought immediate appellate review under Fed. R. Civ. P. 54(b) and 28 U.S.C. § 1292(b). The Eleventh Circuit affirmed. *Benning* v. *Georgia*, Nos. 04-10979, 04-11044, 2004 WL 2749172 (11th Cir. Dec. 2, 2004). The Eleventh Circuit's mandate has not yet issued.

Mr. Madison, a Virginia state prisoner, filed suit under RLUIPA when his requests for a kosher diet were denied by Virginia prison officials. The district court granted summary judgment to the defendants on Mr. Madison's RLUIPA claims, and the Fourth Circuit reversed. See *Madison* v. *Riter*, 355 F.3d 310 (4th Cir. 2003). The defendants sought this Court's review of the Fourth Circuit's ruling, and that petition for certiorari remains pending, 72 U.S.L.W. 3658 (U.S. 2004) (No. 04-1404).

Mr. Charles, a Wisconsin prisoner who had been prohibited from possessing Islamic prayer oil in his cell, challenged that denial under RLUIPA. The district court ruled that this denial violated RLUIPA, *Charles* v. *Verhagen*, 220 F. Supp. 2d 937 (W.D. Wis. 2002), and subsequently upheld the constitutionality of RLUIPA, 220 F. Supp. 2d 955 (W.D. Wis. 2002). The Seventh Circuit affirmed. *Charles* v. *Verhagen*, 348 F.3d 601 (7th Cir. 2003). As a result of his litigation success, Mr. Charles is currently permitted to possess prayer oil.

The Prison Law Office is a nonprofit public interest law firm devoted to protecting the constitutional rights of California prisoners. Located just outside the gates of San Quentin, it has been in the forefront of legal efforts to enforce the Constitution and other laws inside the walls of California's prisons. It currently represents a class of Muslim prisoners (collectively, the "*Mayweathers* plaintiffs") in litigation that, over the past seven years, has sought accommodations to allow the plaintiffs (i) to attend Friday afternoon religious services known as Jumu'ah and (ii) to wear half-inch beards. The district court originally granted the *Mayweathers* plaintiffs preliminary injunctive relief, and California appealed. The Ninth Circuit affirmed the preliminary injunctions, *Mayweathers* v. *Newland*, 314 F.3d 1062 (9th Cir. 2002), and this Court denied the defendants' petition for certiorari, *Alameida* v. *Mayweathers*, 124 S. Ct. 66 (2003). Recently, the district court granted summary judgment in favor of the plaintiffs and entered a permanent injunction, *Mayweathers* v. *Terhune*, 328 F. Supp. 2d 1086 (E.D. Cal. 2004), and the defendants have again appealed to the Ninth Circuit, Nos. 04-16470, 04-16861 (9th Cir. July 28, 2004).

Prison Fellowship is a non-profit, charitable religious organization founded in 1976 by Charles W. Colson and cur-

rently operating in every state and in 106 countries. It ministers to prisoners, ex-prisoners, and their families.

Jewish Prisoner Services International (JPSI) originated as an agency of B'nai B'rith International and was restructured nine years ago into a separate non-profit chaplaincy service. JPSI works in conjunction with all major branches of Judaism and the Jewish Community's other social services agencies to assist Jewish prisoners and their families worldwide. In addition to conducting its own programs, JPSI provides support to localized Jewish chaplaincy programs and is extensively involved with various corrections industry organizations.

Aleph is a non-profit Jewish educational, humanitarian, and advocacy organization. Aleph helps Jewish inmates and their families to maintain essential connections to each other and to their spiritual heritage and provides educational materials to children of Jewish inmates, counseling to spouses, parents and children, and financial assistance to families in need.

The **American Catholic Correctional Chaplains Association (ACCCA)** is a national Catholic organization committed to promoting the principles of restorative justice for all involved with, or affected by, the criminal justice system. Restorative justice is Bible-based and views crime as affecting victims, offenders, their families and the community at large.

Adventist Chaplaincy Ministries (ACM) is comprised of trained chaplains from the Seventh-day Adventist Church. Through the ministry of these chaplains, ACM responds to the spiritual needs of those within unique institutional situations, including the correctional, educational, healthcare, and military settings.

Citizens United for the Rehabilitation of Errants (CURE) is a national membership organization dedicated to reducing crime through reform of the criminal justice system, chiefly prison reform. Most of CURE's 15,000 members are prisoners, former prisoners, and families of prisoners.

CURE's two goals are (1) to use prisons only for those who have to be in them, and (2) for those who have to be in them, to provide them all the rehabilitative opportunities they need to turn their lives around.

The **John Howard Association (JHA)** is a 103-year-old corrections reform organization that concerns itself with the conditions of confinement in prisons, jails, and juvenile detention centers in Illinois and elsewhere, and that promotes fair, safe, and humane corrections policies and practices that meet the needs of both the offender and the community. JHA recruits and trains citizen volunteers who participate in over 70 correctional facility monitoring visits each year. In these monitoring visits JHA staff members and volunteers speak to countless corrections officials, chaplains, program administrators, and incarcerated individuals, and observe correctional programs in action.

The **Shambhala Prison Community (SPC)** and the **Prison Dharma Network (PDN)** are involved in Buddhist prison ministry. As practitioners of a minority religion and one that is frequently misunderstood, SPC and PDN often encounter resistance when prisoners request their services. The protections afforded by RLUIPA enhance SPC's and PDN's ability to bring their services to persons confined to state prisons.